No. 86-1063

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEFFREY K. RAFSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that his check kiting scheme was not within the reach of the wire fraud statute, 18 U.S.C. 1343.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 25 counts of wire fraud in connection with a check kiting scheme, in violation of 18 U.S.C. 1343. He was sentenced to three years' probation and a $1,000 fine. In addition, he was ordered to make restitution to the defrauded bank. The court of appeals affirmed (Pet. App. A1-A7).

a. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A3). It showed that, as president and 30 percent owner of a holding company, Trend Group, petitioner engaged in an elaborate check kiting scheme during late 1983 and early 1984.

Trend Group was the sole owner of Lease Trend Company, an automobile leasing company. Trend Group maintained a checking account at Citizens Fidelity Bank and Trust Company in Louisville, Kentucky, and Lease Trend had a checking account at the Provident National Bank in Philadelphia. In September 1983, Trend Group experienced financial difficulties, largely because of the failure of an Arab sheik to pay a substantial debt to Lease Trend. As a result, Lease Trend's payments on a $4,000,000 line of credit at Provident became delinquent. To meet the financial pressures faced by Trend Group and Lease Trend, petitioner devised a scheme to take advantage of the "float" between the checking accounts in Philadelphia and Louisville. Lease Trend had an agreement with Provident that gave Lease Trend immediate credit for checks deposited to its account, before the checks actually cleared the Federal Reserve System. Taking advantage of this arrangement to create an artificially high balance in the Lease Trend account, petitioner would write checks drawn on Trend Group's Louisville bank and deposit them in the Philadelphia bank, which would then immediately credit Lease Trend's account. The Louisville checks, however, were not backed by sufficient funds. In order to cover the amount drawn on the Louisville account, petitioner would then transfer money by wire from Philadelphia to Louisville, drawing on the artificially high Philadelphia balance.

In February 1984, Provident investigators noticed that Lease Trend's average daily balance was unusually high, and that this high balance was due to checks drawn on the Louisville account. As a result of the investigation, Provident suspended Lease Trend's wire transfer privileges. The Louisville checks were then processed without the benefit of a wire transfer to cover the checks, and were returned to Provident for lack of sufficient funds. As a result, it was revealed that Lease Trend's account was overdrawn by some $2,815,000.

b. Petitioner appealed his jury conviction, and the court of appeals affirmed (Pet. App. A1-A7). It devoted its opinion to rejecting petitioner's contention that *Williams* v. *United States*, 458 U.S. 279 (1982), barred petitioner's conviction under 18 U.S.C. 1343 for his check kiting scheme.

2. Petitioner now renews his claim that *Williams* precludes his prosecution under Section 1343, and that the Third Circuit's opinion to the contrary conflicts with decisions in the Sixth and Seventh Circuits. These claims are meritless, and further review is not warranted.[1]

a. In *Williams*, the defendant was convicted of violating 18 U.S.C. 1014 by knowingly depositing a check that was supported by insufficient funds. That statute prohibits "any false statement or report" knowingly designed to influence a federally insured bank in making loans or other financial commitments. In reversing the conviction, this Court held that a check is not a "false statement" within the meaning of Section 1014. The Court stressed that if merely writing a worthless check could form the basis for a prosecution under Section 1014, then a "surprisingly broad range of unremarkable conduct [would be] a violation of federal law." 458 U.S. at 286.

In this case, petitioner was charged not with making a "false statement or report" in violation of Section 1014, but with violating 18 U.S.C. 1343. That statute prohibits the use of a "wire, radio, or television communication" in furtherance of "any scheme or artifice to defraud, *or* for obtaining

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[1]We note at the outset that petitioner's claim that there was no evidence of a violation of Section 1343 in this case aside from his series of bad checks—which the court of appeals apparently assumed arguendo to be true—is wrong. Petitioner lied twice, for example, to Provident officials regarding Lease Trend's account activity (C.A. App. 503a, 523a-525a); he also lied to his controller (*id.* at 343a-345a, 355a). See also Gov't C.A. Br. 11-20.

money or property by means of false or fraudulent pretenses, representations, or promises."

Nothing in *Williams* limits the "scheme or artifice" clause or suggests that it is inapplicable to check kiting. Indeed, there is ample evidence in *Williams* to the contrary. The Court there expressly noted that "the violation [that had been found] of § 1014 is not the *scheme* to pass a number of bad checks; it is the presentation of one false statement—that is, one check that at the moment of deposit is not supported by sufficient funds—to a federally insured bank." 458 U.S. at 286-287 (emphasis in original). Thus, as the court below observed, *Williams* "draws a qualitative distinction between an individual bad check and a 'scheme to pass a number of bad checks,' " thereby "implying that a deliberate plan to deceive through submitting checks backed by insufficient funds is not the same sort of crime as merely passing a single bad check" (Pet. App. A4 (footnote omitted)). Similarly, the Court in *Williams* was concerned only that "any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, *whether or not the drawer had an intent to defraud.*" 458 U.S. at 286 (emphasis added).[2]

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[2]The judge's instructions to the jury in the present case specifically focused the jury's attention on the need to find a scheme to defraud, "calculated to obtain something of value through deception"; the instructions also made clear that, as the *Williams* court held, a check is not in itself a false statement (C.A. App. 930a):

> You may not, for example, rely solely upon evidence that checks not supported by sufficient funds were presented to a bank, to conclude that the defendant engaged in a scheme to defraud. Moreover, a check by itself is simply a direction to a bank to pay funds. A check is not a factual assertion, and cannot itself be found to be deceptive or characterized as "true" or "false." You need not find [that] the defendant made any particular representation or false statement at all, however, in order to find that the scheme taken as a whole was calculated to obtain something of value through deception.

Petitioner contends (Pet. 6-12) that a scheme to defraud must necessarily involve a misrepresentation of some sort. If petitioner defines "misrepresentation" to mean a statement, act, or omission in furtherance of a scheme to defraud—as he sometimes seems to—then of course he is right and of course the government's evidence regarding his check kiting scheme qualifies. Systematically writing a series of bad checks to take advantage of a credit "float" and creating an overdraft of $2,815,000 involves, under the broad definition, dishonest statements, acts, or omissions.

On the other hand, if petitioner means to say that one can defraud only through an explicit false statement, then his contention has no basis in the statute, the cases, or common sense. Section 1343 (and the almost identically worded 18 U.S.C. 1341, concerning mail fraud) prohibits in the disjunctive schemes to defraud and schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." See, *e.g.*, *United States* v. *Scott*, 701 F.2d 1340, 1343-1344 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981). As the court of appeals in *Halbert* stated, "A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved." 640 F.2d at 1007 (citations omitted). It is untenable to say that one can defraud only by overt lying and not by actions, half-truths, omissions, and innuendo, and there is no support for such a proposition under Section 1343. See *United States* v. *Frankel*, 721 F.2d 917, 919-920 (3d Cir. 1983); *United States* v. *Townley*, 665 F.2d 579, 585 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973), cert. denied, 419 U.S. 825 (1974).

b. Petitioner is not aided by the Sixth and Seventh Circuit decisions he cites (Pet. 7-12) for the proposition that a scheme to defraud must involve "misrepresentations or omissions." Once again, a broad definition of "misrepresentations or omissions" would not reverse his conviction, and a narrow definition is inconsistent with the broad language of the statute. In the cited cases, the courts had no need to address situations where the fraudulent scheme might be implemented by means other than an explicit lie. The references in the cited cases therefore cannot be read to suggest a restrictive interpretation of the meaning of "scheme or artifice to defraud." Cf. *United States* v. *Frankel*, 721 F.2d at 919. Moreover, other Sixth and Seventh Circuit decisions clearly indicate that an individual may be convicted under Section 1341 without having made specific misrepresentations or omissions. *United States* v. *Gray*, 790 F.2d 1290, 1294-1295 (6th Cir. 1986), cert. granted on other grounds, No. 86-286 (Dec. 8, 1986); *United States* v. *Keane*, 522 F.2d 534, 545, 551 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1151 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Fournier* v. *United States*, 58 F.2d 3, 5 (7th Cir.), cert. denied, 286 U.S. 565 (1932) (citation omitted) ("It is well settled that to establish [a scheme to defraud] it is not necessary that there should be actual misrepresentation of an existing fact. It is sufficient if the proposed venture be presented in such a way as is calculated to carry out the intent to deceive."). In light of the fact that the statute is worded in the disjunctive, it is not surprising that no court has adopted petitioner's conjunctive reading, and that no court has defined "misrepresentations or omissions" so narrowly as to shield a scheme like petitioner's from prosecution.

c. Finally, we note that, after the commission of the offenses in this case, Congress enacted 18 U.S.C. (Supp. III) 1344, which provides for the prosecution of any person who executes a "scheme * * * to defraud" a bank or to obtain a bank's money "by means of false or fraudulent pretenses, representations, or promises." The legislative history of that statute indicates that one of its purposes was to reach check kiting. S. Rep. 98-225, 98th Cong., 1st Sess. 378 (1983). The use of language in Section 1344 identical to that in Section 1343 to outlaw check kiting bolsters our contention that Section 1343 also encompasses check kiting schemes, where the check kiting is accomplished through the use of interstate wires. In any event, the enactment of Section 1344 significantly limits the importance of the issue presented in this case, since in future cases the government will likely use the new statute—which does not require proof of a mailing or wire transmission—to prosecute check kiters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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